

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
AT&T Corp. Petition Pursuant to 47 U.S.C.	)	
Section 160(c) of the Communications Act	)	WC Docket No. 03-256
for Forbearance from Enforcement of	)	
Section 204(a)(3) of the Communications	)	
Act, As Amended	)	
	)	

**Joint Comments of**

**EASTERN RURAL TELECOM ASSOCIATION  
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE  
NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.  
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL  
TELECOMMUNICATIONS COMPANIES  
UNITED STATES TELECOM ASSOCIATION  
WESTERN TELECOMMUNICATIONS ALLIANCE<sup>1</sup>**

AT&T's Petition for Forbearance<sup>2</sup> must be denied because, despite its title, it asks the Commission to increase, rather than forbear from, regulation, an action that is neither permitted under the "plain language" of section 10(a) of the Act<sup>3</sup> nor consistent with Congress' intent in granting forbearance authority to the Commission. Even if section

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<sup>1</sup> The Associations are membership organizations that collectively represent all incumbent local exchange carriers providing service in the United States. The Associations' members are heavily regulated by the Commission and are required to file interstate access tariffs pursuant to Part 69 of the Commission's Rules. As "dominant" carriers, the Associations' members are subject to the full panoply of common carrier regulation under Title II of the Communications Act of 1934 (the "1934 Act" or "Act"), as amended by the Telecommunications Act of 1996 (the "1996 Act"), and would be substantially affected by grant of the instant petition.

<sup>2</sup> AT&T Petition for Forbearance (December 3, 2003) (*Petition*).

<sup>3</sup> 47 U.S.C. § 160(a).

10(a) did contemplate allowing the Commission to re-regulate rather than foster telecommunications deregulation, the Commission must deny AT&T's *Petition* because AT&T lacks standing to request regulatory forbearance from section 204(a)(3) of the Act.

## **BACKGROUND**

The Commission has long sought to reduce or relax regulatory burdens on telecommunications carriers, most notably via its *Computer Inquiries* and *Competitive Carrier* proceedings, among many others.<sup>4</sup> Prior to the 1996 Act, the Commission's deregulatory initiatives were undertaken within the highly regulatory confines of the 1934 Act, which limited the Commission's ability to accomplish its deregulatory goals.<sup>5</sup> Congress accordingly passed the 1996 Act intending specifically to "promote competition and *reduce regulation* . . ." in the telecommunications marketplace.<sup>6</sup>

The 1996 Act contains many macroscopic, industry-wide deregulatory and pro-competitive provisions, most notably provisions governing Bell Company entry into the long distance market place and provision of interconnection arrangements by local exchange carriers. But Congress also specifically addressed the need to reduce Commission regulation of exchange carrier tariffs. It did so by adding a provision to section 203 of the Act that permits the Commission to alter the basic tariff filing

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<sup>4</sup> See, e.g., Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, Docket No. 16979, *Final Decision and Order*, 28 F.C.C. 2d 267 (1971) (*Computer I*); Amendment of Section 64.702 of the Commission's Rules and Regulations, Docket No. 20828, *Final Decision*, 77 F.C.C.2d 383 (1980) (*Computer II*); Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, *Report and Order*, 104 F.C.C. 2d 958 (1986) (*Computer III*); Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, *Sixth Report and Order*, 99 F.C.C. 2d 1020 (1985).

<sup>5</sup> See, e.g., *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

<sup>6</sup> Introduction to 1996 Telco Act, S. Res. 652, 104<sup>th</sup> Cong. (1996) (enacted).

requirement imposed therein, and it added subsection (a)(3) to section 204 of the Act, incorporating language in the statute permitting carriers to file tariffs on a “streamlined” basis. Such tariffs, when permitted to become effective, are “deemed lawful” according to the statute.

The Act’s legislative history provides little guidance as to the intent of the “deemed lawful” provision of section 204(a)(3). However, the Commission has recognized that the plain language of this provision, viewed in the context of historic legal principles applicable to tariff regulation, significantly changed the regulatory treatment of local exchange carrier (LEC) tariff filings.<sup>7</sup> In short, a “deemed lawful” tariff rate becomes *ipso facto* a reasonable rate, and carriers charging such rates are immune from claims for refunds or damages filed by customers based on claims that the rate may be unreasonable.<sup>8</sup> Furthermore, as the court explained in *ACS of Alaska v. FCC*,<sup>9</sup> the protection afforded by section 204(a)(3)’s “deemed lawful” language extends not only to claims for refunds of specific charges paid under a deemed lawful tariff, but also to claims for refunds based on earnings derived from deemed lawful rates that exceed a prior commission rate of return prescription.

There can be no question that section 204(a)(3) was intended to reduce Commission regulation of local exchange carrier tariffs. According to Senator Bob Dole, who sponsored the amendment that incorporated this provision in the Act, the intent was

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<sup>7</sup> Implementation of Section 402(b)(1)(a) of the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, 11 FCC Rcd 11233 (1996) (*Streamlined Tariff Notice*).

<sup>8</sup> *Id.*

<sup>9</sup> *ACS of Anchorage, Inc., Petitioner, v. Federal Communications Commission and United States of America, Respondents, General Communication, Inc., Intervenor*, 290 F.3d 403 (D.C. Cir. 2002).

to “[s]peed up FCC action for phone companies by making any revised charge that reduces rates effective seven days after it is filed. Rate increases will be effective fifteen days after submission. To block such changes, the FCC must justify its actions.”<sup>10</sup>

Similarly, the Joint Explanatory Statement of the Managers Committee of Conference accompanying the 1996 Act states that this provision “addresses regulatory relief that streamlines the procedures for revision by local exchange carriers of charges, classifications and practices under section 204 of the Communications Act.”<sup>11</sup>

Recognizing that changing market conditions and technological advances might warrant additional deregulatory actions, Congress also incorporated two provisions in the 1996 Act intended to assist the process on an ongoing basis. Specifically, section 10 provides authority for the Commission to “forbear” from applying provisions of the Act or its rules when showings have been made that the provisions are no longer warranted and that forbearance is in the public interest.

The Conference Report to the Telecommunications Act of 1996 (“1996 Act”) stated as follows:

The conferees agree to create a new section 10 in title I of the Communications Act. New subsection (a) of section 10 requires the Commission to forbear from applying any provision of the Communications Act or from applying any of its regulations to a telecommunications carrier or telecommunications service, if the Commission determines that enforcement is not necessary to: ensure that charges, practices, classifications or regulations for such carrier or service are just and reasonable, and not unjustly or unreasonably discriminatory; protect consumers; and protect the public interest.<sup>12</sup>

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<sup>10</sup> 141 CONG. REC. S7898 (daily ed. June 7, 1995) (Statement of Sen. Dole).

<sup>11</sup> Joint Explanatory Statement, S. Conf. Rep. No. 104-230, 104<sup>th</sup> Cong., 2d Sess, 69 (1996).

<sup>12</sup> H.R. CONF. REP. NO. 104-458, at 184-85 (1996).

In the debate preceding passage of the 1996 Act, Congressman Richard Burr (R. N.C.) spoke of the North Carolina Electronics and Information Technologies Association's ("NCEITA") support for the inclusion of forbearance authority in the Act in order to spur the development of an advanced telecommunications network.<sup>13</sup> During the summer of 1995, Senator Larry Pressler (R. S.D.) spoke at length concerning S. 652, which would ultimately become the nucleus of the 1996 Act. The Senator's remarks included a discussion of the forbearance concept:

S. 652 also ensures that regulations applicable to the telecommunications industry remain current and necessary in light of changes in the industry. First, the legislation permits the FCC to forbear from regulating carriers when forbearance is in the public interest. This will allow the FCC to *reduce* the regulatory burdens on a carrier when competition develops, or when the FCC determines that *relaxed* regulation is in the public interest.<sup>14</sup>

Recognizing that the Commission might not itself initiate forbearance actions, section 10(c) grants carriers affected by outdated regulations the right to petition the Commission for forbearance:

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

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<sup>13</sup> 142 CONG. REC. E168 (daily ed. Feb. 5, 1996) (remarks of Rep. Burr).

<sup>14</sup> 141 CONG. REC. S7886 (daily ed. June 7, 1995) (remarks of Sen. Pressler) (emphasis added).

The legislative history of this subsection makes clear that the intent was to force the FCC to “*eliminate* outdated regulations, and do so in a timely manner.”<sup>15</sup> Without a doubt, the purpose of section 10 of the Act is to *reduce* regulatory burdens on carriers where circumstances warrant. Senator Dole, indeed all of Congress, would be astonished to hear suggestions that the Commission should use section 10 to *add* regulatory requirements to the Act. Yet that is exactly what AT&T asks the Commission to do in the instant proceeding.

## ARGUMENT

### **I. The Act’s Forbearance Authority Does Not Permit the Commission to Increase Regulatory Burdens on Carriers.**

As explained above, section 10(a) of the Act permits the Commission to reduce the Act’s regulatory requirements when market and technological circumstances indicate that enforcement of specific provisions is no longer necessary or in the public interest. It does not permit the Commission to subvert the Act’s deregulatory provisions by way of “forbearing from enforcing” (*i.e.*, ignoring) specific regulatory exemptions granted by Congress. AT&T’s petition must therefore be denied.

AT&T does not cite any authority for the notion that section 10(a)’s forbearance authority can be used to *increase* regulatory burdens on carriers. Its *Petition* simply assumes, in true Bizarro-World fashion, that that the term “forbearance” can mean its

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<sup>15</sup> 141 CONG. REC. S7898 (June 7, 1995) (Statement of Sen. Dole) (emphasis added).

precise opposite, and proceeds from there to argue that the various prerequisites for forbearance are met.<sup>16</sup>

The problem with this approach is that the effect of “forbearing from enforcing” a deregulatory provision of the Act (in this case, the deemed lawful provision of section 204(a)(3)) is to increase regulation, a result not contemplated by the language of section 10(a) or by Congress.

There are many provisions of the 1996 Act that have the effect of deregulating or exempting specific types of communications providers from the Act’s requirements. For example, section 2(b)(2) of the Act exempts “connecting carriers” from certain provisions of the Act. Based on AT&T’s premise, could the Commission “forbear from enforcing” section 2(b)(2) and thereby force these carriers to comply with all provisions of the Act? Similarly, section 652 of the Act permits the Commission to authorize telephone companies to offer cable television services to its customers once certain conditions (e.g., a rural carrier providing CATV to 10% of its service area) specified in the statute are met. Under AT&T’s logic, would section 10(a)’s forbearance power enable the Commission to re-impose the prohibition on telcos owning or operating cable systems in their service areas if a case could be made that a telephone company’s entry in to the cable market isn’t “necessary” to assure reasonable rates, the protection of consumers, or the protection of the public interest? Such results would, of course, be absurd.

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<sup>16</sup> AT&T argues, for example, that forbearance from the deemed lawful provisions of section 204(a)(3) would be justified because (in AT&T’s view, at least) “deemed lawful” tariffs aren’t necessary to assure reasonable rates or to protect consumers. *Petition* at 14. But the purpose of the Act’s “deemed lawful” provision was to protect exchange carriers’ streamlined tariffs, not interexchange carriers. To “forbear from enforcing” this provision would directly contradict that intent.

In sum, the Act's forbearance authority permits the FCC to impose less regulation under certain situations. It does not permit the Commission to impose more regulation under the guise of "forbearing from enforcing" an exemption from regulation. To do so would contradict the plain meaning of the term "forbearance" and would subvert Congress' intent that Section 10 of the Act be used to reduce unnecessary regulation. AT&T's petition must accordingly be denied because the Commission lacks authority to grant the relief requested therein.

## **II. AT&T Lacks Standing to Request Forbearance of Section 204(a)(3).**

The "deemed lawful" provision of section 204(a)(3) applies only to local exchange carriers, not interexchange carriers such as AT&T. Thus, even if the relief requested by AT&T could be considered as a request for forbearance under section 10 of the Act, AT&T's petition must be denied because AT&T lacks standing to request such relief.

Long-settled principals of jurisdictional standing require that a petitioner have some direct interest in a proceeding in order to participate as a party.<sup>17</sup> While AT&T is arguably affected by the "deemed lawful" provisions of section 204(a)(3) in its capacity of ratepayer, it is not itself subject to section 204(a)(3)'s provisions and cannot therefore seek relief from them.

Section 10(c) of the Act itself makes clear that petitions for forbearance can only be filed by carriers that are subject to a particular rule:

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission

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<sup>17</sup> See, e.g., *Application of Caminito Cellular Partnership*, 14 FCC Rcd 9227, at n.19 (Wir. Tel. Bur. 1999) (citing *Clark v. Securities Industry Ass'n.*, 479 U.S. 388, 399 (1987)).



exercise the authority granted under this section *with respect to that carrier or those carriers*, or any service offered *by that carrier or carriers*.<sup>18</sup>

Thus, section 10(c) allows a carrier to request forbearance from rules that apply to itself (or similarly situated carriers), but does not permit carriers or other parties to request forbearance of rules that apply only to other carriers. Accordingly, AT&T's *Petition* must be dismissed for lack of standing.<sup>19</sup>

### CONCLUSION

Neither the plain language of section 10(a) nor the intent of that section permits the Commission to “forbear from enforcing” one of the Act’s deregulatory provisions where the effect of doing so would be to increase, rather than decrease, regulatory burdens on affected carriers. Even if section 10(a)’s forbearance provisions did contemplate such an absurd result, AT&T’s *Petition* must be denied because AT&T lacks standing to request regulatory forbearance from rules that do not apply to itself.

Respectfully Submitted,

January 30, 2004

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<sup>18</sup> 47 U.S.C. § 160(c) (emphasis added).

<sup>19</sup> A carrier may, of course, seek relief under section 10 from rules that are burdensome to itself, and the Commission may grant the relief sought to that carrier or class of carriers.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Association's Comments was served this 30<sup>th</sup> day of January 2004, by electronic filing, or first class mail, to the persons listed below.

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